or underpaid for programming services. Likewise, programmers should be permitted at their discretion to require either security deposits or guarantees of technical quality from distributors using new technologies, particularly where these distribution services will introduce subscribers to the programmer's service for the first time. Alternatively, the Commission should acknowledge that the program provider may charge a higher price to such distributors as compensation for the increased risk of serving them.

4. In Order To Obtain Comparable Pricing, Buying Groups Must Commit To The Same Terms And Conditions As "Similarly Situated" Customers.

Section 628(c)(2)(B) extends the non-discrimination protections to the "agents" or "buying groups" of cable operators, cable systems or other multichannel video programming distributors to whom that section applies. Consequently, the Commission seeks comment on whether groups seeking "price discounts -- or other favorable considerations -- based on size" should be required to accept "unitary treatment for other relevant purposes." NOPR at ¶26. The Commission also questions whether it should establish limits on the size of individual entities participating in such buying groups.

In order to obtain the benefits of group purchases, members of buying groups also should be required to accept "unitary treatment," i.e. the same non-price terms and

conditions. Although specific provisions may vary from group to group to meet their respective needs, members within a purchasing group cannot expect to receive both the price benefits of cooperative purchasing and individualized treatment with respect to relevant non-price considerations such as billing. Likewise, members of a buying group should be jointly and severally liable for the commitments of the group.

However, it does not appear necessary now to limit the size of individual entities participating in buying groups provided that the total number of subscribers represented by the group does not exceed whatever horizontal concentration limits are established by the Commission pursuant to Section 11 of the 1992 Cable Act. See Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-264, FCC 92-542, released December 28, 1992, at ¶¶29-40 ("Horizontal Concentration Rulemaking"). The purpose of the subscriber limits to be established by the Commission pursuant to Section 11 is, among other things, "to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer." Horizontal Concentration Rulemaking at ¶30 (emphasis added). Consequently, the Commission should not permit buying groups to exceed those subscriber limits.

C. Antidiscrimination Rules Should Not Prohibit Price Differences Required To Meet Competition.

The Commission's regulations implementing the anti-discrimination provisions of Section 628 should expressly allow for price differentials required to permit a satellite programmer to meet competition from other programmers seeking to serve a particular multichannel video programming distributor. Each of the statutory schemes to which the Commission has referred for guidance in distinguishing between justified and anticompetitive price differences allows for price adjustments to meet competition.[12]

The Commission has stated that differences in common carrier rates may be justified by "differences in competitive circumstances or conditions." Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5903 n.16 (1991), on recon. 7 FCC Rcd. 2677 (1992). Likewise, meeting competition consistently has been recognized as a defense to claims of price discrimination or unfair competition under the Robinson-Patman Act. See Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 438-52 (1983); Standard Oil Co.

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[12] While the statute should not be interpreted "to require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms" (see NOPR at ¶25), the fact that they do act similarly in particular circumstances should be sufficient to rebut an allegation of unfair favoritism or discrimination on the part of a vertically integrated entity.

v. F.T.C., 340 U.S. 231, 241-51 (1951). [13] Although anti-dumping laws do not contain an explicit exception for prices intended to meet competition, the International Trade Commission has recognized the "technical dumping"[14] defense in certain cases. See, e.g., Asphalt Roofing Shingles from Canada, Inv. 731-TA-29, U.S.I.T.C. Pub. 1100 at 14 (Oct. 1980) (finding "at most" technical dumping where "verified data on lost sales...do not reveal price undercutting").

D. Discounts Justified By Economies Of Scale, Cost Savings Or Other Economic Benefits Are Plainly Permissible.

Under Section 628(c)(2)(B)(iii), programmers may offer discounted prices based on economies of scale, cost savings or other "direct and legitimate economic benefits." Congress did not further define or otherwise limit the allowable discounts for such benefits.

Clearly, program suppliers should not be regulated in the manner of dominant common carriers. However, even

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[13] The Robinson-Patman Act permits a seller to adjust its prices to meet competition in order to keep existing customers or to attract new ones. See Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 446 (1983) (meeting competition defense "does not distinguish between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers").

[14] Technical dumping occurs when a foreign product is sold at a price lower than the product's price in its home market but not lower than the competitive price in the United States. See 1 B.E. Clubb, United States Foreign Trade Law, §21.15.2 (1991).

as to those carriers, the Commission has recognized that "[g]reater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory." Private Line Rate Structure and Volume Discount Practices, 97 F.C.C.2d 923, 948 (1984). Thus, the Commission announced in that proceeding that volume discounts above marginal costs but below fully distributed costs would be allowable. At the same time that the Commission is attempting to decrease its burden in reviewing common carrier tariffs, it should not impose a complicated cost justification procedure upon programmers.

The Commission should generally identify those kinds of "economic benefits" which would justify discounted rates. For example, program services may offer volume discounts to large multichannel video programming distributors because they can collateralize the contracts and obtain financing for their ventures. Large-volume sales may increase the promotion of programming services and generate broad consumer recognition and acceptance. Often, smaller distributors will follow the initial "roll out" of programming services by large MSOs, further expanding distribution. Increased advertising revenues also are associated with volume distribution (at both national and regional levels). Clearly, these kinds of "economic benefits" justify volume discounts.

E. Standards Based On "Reasonable Regions" Of Price Differentials Must Recognize Fundamental Differences Among Services, Technologies, And Carriage.

The first option proposed by the Commission for identifying discriminatory price differentials would establish a rebuttable presumption of non-discrimination for price differentials falling within "a reasonable region." NOPR at ¶20. The Commission states that a sufficiently broad "safe harbor" of price differentials "might reduce the administrative burden in resolving complaints." Id. Consequently, the Commission seeks comment on "an appropriate method for determining the parameters" of the "reasonable region" and whether "different thresholds are necessary for different technologies." Id.

While the establishment of a presumptively nondiscriminatory region of price differentials might ease the Commission's administrative burden and provide guidance to the industry, the boundaries of the safe harbor region will be difficult to determine. Liberty respectfully submits that the large number of differences among services, costs, carriage arrangements, and technologies make it exceedingly difficult to develop a "bright-line" presumption of reasonableness or unreasonableness for a particular rate to a particular customer. Indeed, such an approach poses a real danger of being arbitrary and capricious and of dampening price competition among programmers.

In many cases, program prices are so low that a price differential of a few pennies translates into enormous "percentage" differences. For example, the Commission stated in its Inquiry Into the Existence of Discrimination in the Provision of Superstation And Network Station Programming (Second Report), 6 FCC Rcd. 3312, 3320 (1991), that:

> [E]ven seemingly wide percentage differences between rates and costs may correspond to relatively small actual differences in money amounts paid per station, per subscriber, per customer, per month.

Consequently, a "reasonable region" of price differentials based on percentages may have little meaning.[15] Under these circumstances, a "region" based on specified dollar amounts may be more appropriate.

Nonetheless, if the Commission determines to pursue this "safe harbor" approach, alternative "reasonable regions" of price differentials are required to account for basic differences. For example, the fundamental differences among technologies in delivering satellite programming to consumers mandate different regions. Likewise, the different statutory copyright provisions applicable to the delivery of broadcast superstation signals to cable systems and to HSD owners appear

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[15] For example, in considering a price differential of "$1.00 per month for HSDs and $.02-.20 for cable subscribers," the Commission found that, "[i]n absolute terms, the difference is not significant." Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennae, 2 FCC Rcd. 1669, 1686 (1987).

to require different pricing "regions." Liberty also believes that the manner of carriage by the multichannel video programming distributor may significantly affect pricing "regions." Numerous other differences may require different "regions" or changes in the size of a given "region."

IV. Exclusivity Agreements Serve The Public Interest By Promoting Competition And Program Diversity.

Section 628(c)(2)(C) requires the Commission to adopt regulations to prohibit "practices, understandings, arrangements and activities, including exclusive contracts" between cable operators and satellite programmers that prevent a multichannel video programming distributor from obtaining such programming from a satellite programmer in which a cable operator has an attributable interest for distribution to persons "in areas not served by a cable operator as of the date of enactment of this section." Section 628(c)(2)(D) contains a similar prohibition of exclusive contracts for programming to be distributed by multichannel video programming distributors in areas "served by a cable operator" unless the Commission determines that the exclusive contract serves the public interest pursuant to Section 628(c)(4).

Consistent with its previous decisions, the Commission should confirm that exclusivity is a legitimate means of competition which benefits the public interest and is a particularly appropriate tool to develop and launch new programming

services and to introduce existing services in new markets. Exclusivity is often a means by which a satellite programmer can induce the cable operator to engage in promotional activities necessary to introduce a new service.

Section 628(c)(2)(D) governs areas served by cable and expressly permits those exclusive agreements between cable operators and vertically integrated satellite programmers which the Commission determines to be in the public interest. The statute sets forth certain criteria for determining whether an exclusive contract serves the public interest, including the effect of such exclusive contract on: (1) "competition in local and national multichannel video programming distribution markets;" (2) "competition from multichannel video programming technologies other than cable;" (3) the "attraction of capital investment in... new satellite cable programming;" and (4) the "diversity of programming in the multichannel video distribution market." See Section 628(c)(4). The Commission has examined the issue of exclusive programming agreements before and has concluded that such agreements are consistent with the public interest.

First, the Commission has recognized that exclusive programming arrangements are pro-competitive and, therefore, benefit consumers:

> [E]xclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting. Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts.

Syndicated Exclusivity, 3 FCC Rcd. 5299, 5310 (1988), aff'd sub nom., United Video, Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989) (emphasis added). NTIA also examined the issue of program exclusivity and reached substantially the same conclusion. See NTIA, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, 107 (1988) (program exclusivity agreements "generally represent sound and legitimate business transactions creating benefits for both parties").

Moreover, the Commission has recognized that eliminating program exclusivity is likely to decrease diversity by creating a disincentive for investment in new programming service. For example, in its Report to Congress, 5 FCC Rcd. 4962, 5009-10 (1990), the Commission recognized a "free rider" problem which could "resul[t] in a decrease in overall expenditures which would otherwise be devoted to programming investments." Common sense dictates that the incentive to invest in new programming will diminish if programming must be made available to competitors who do not share the high risk associated with new programming but reap the benefits when it is successful. Likewise, competing multichannel video distri-

butors will have little incentive to invest in alternative programming and incur that risk if they can purchase at favorable rates successful programming developed and promoted by their competitors.

At the very least, the Commission should permit in cabled areas exclusive contracts for new programming services and for the introduction of existing services to previously unserved areas regardless of a cable operator's attributable interest in the programming. Programmers also should be permitted to meet a competitor's offer of exclusivity and to enter exclusive contracts when comparable programming alternatives are available. Likewise, if alternative distribution media enter exclusive agreements with other programmers, the limitation on exclusive contracts with cable operators serving the same geographic markets should be lifted.

In addition, the Commission should permit exclusive arrangements for local or regional programming in which cable operators hold an attributable interest. Absent exclusivity, cable operators have little incentive to invest in such local programming. Yet, such investment by cable operators clearly furthers not only the diversity of programming available to consumers, but also the "substantial government interest in ensuring [the] continuation [of]...local origination of programming." 1992 Cable Act, Section 2(a)(10).

V. The Commission Must Also Address Numerous Critical Implementation And Enforcement Issues.

A. Existing Programming Contracts Should Be Grandfathered.

The Commission tentatively concludes that "any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts." NOPR at ¶27. However, "given the long term nature of many programming agreements," the Commission questions whether grandfathering of those agreements would so frustrate the intent of Congress in enacting Section 628 that instead it should establish "an appropriate compliance deadline for existing contracts." Id. The Commission also seeks comment on whether: (1) contracts renewed between the adoption of the NOPR and the effective date of the rules adopted thereunder should be required to comply with the rules; and (2) discrimination claims may be based on comparisons with contracts that predate the new rules. Id.

Liberty supports the Commission's tentative conclusion to grandfather programming agreements which predate the adoption of its rules. Those agreements were negotiated in good faith by the parties and were consistent with applicable law when executed. Moreover, cable operators and other multichannel video programming distributors have planned their schedule of program offerings for the foreseeable future on the basis of the existing agreements. Likewise, programmers

have relied on existing distribution agreements in contracting to purchase programming for their services. Sudden invalidation of existing agreements based on newly adopted regulations would create chaos in the programming and video distribution industries and could result in the interruption of programming services to consumers.

The Commission's concern over the length of existing programming agreements is exaggerated. Although the term of existing agreements may extend for several years, all agreements were not executed at the same time and do not run concurrently. Thus, the natural expiration of existing programming agreements will provide for a gradual phase-in of the new regulations rather than immediate disruption of the marketplace.

A gradual transition to the new rules is consistent with the legal requirement that regulations which modify "preexisting interests" or have other retroactive economic consequences be reasonable in effect. General Tel. Co. of Southwest v. United States, 449 F.2d 846, 863 (5th Cir. 1971). Thus, the Court of Appeals previously has invalidated the retroactive application of programming rules "because it would cause serious economic harm to independent producers and because it gives networks inadequate time to plan additional programming." Nat'l Assoc. of Independent Television

Producers and Distributors v. F.C.C., 502 F.2d 249, 255 (2d Cir. 1974).

Moreover, as a practical matter, neither the programmers nor the distributors are equipped to revise large numbers of programming agreements in a short period of time. The negotiation process can be time consuming and, particularly with the advent of the new rules, is likely to require additional legal review. Programmers simply would not have sufficient staff to renegotiate all of their agreements over a short time period. At a minimum, if the Commission does not grandfather all existing agreements, it should provide for a substantial transition period for such agreements.

Finally, parties negotiating new contracts subject to the new rules should not be permitted to bring discrimination claims based on comparisons with contracts which predate the new rules. Regulations adopted to implement Section 628, as well as other provisions of the 1992 Cable Act, may have a significant effect on various factors affecting cable programming prices, terms and conditions. For example, must-carry obligations, regulation of rates for basic and other cable services, regulation of equipment charges, channel occupancy limits on vertically integrated programming, and leased access rate regulation may have a substantial impact on the prices and terms at which cable operators are willing to purchase particular programming. Comparisons of program prices

and terms negotiated in the context of the comprehensive regulatory scheme imposed by the 1992 Act and the Commission's implementing rules with prices and terms negotiated in the absence of such comprehensive regulation would be meaningless and cannot provide a basis for claims of discrimination.

B. Standards For Determining Whether A Complainant Has Established A Prima Facie Case Cannot Be Based On Penetration Levels.

The Commission proposes two possible approaches for developing "objective standards" to determine whether a complainant has established a prima facie case of discrimination. The first is based on a "penetration benchmark" such that:

> [I]f the penetration level of a particular satellite cable program service ("Program Service X") to MMDS operators is below a specified percentage, then a rebuttable presumption in favor of a complainant concerning its access to "Program Service X" would be built into the complaint process in determining whether a prima facie case has been presented."

NOPR at ¶43 and n.61. The second approach would establish a benchmark ratio between the volume of programming sold by a vertically integrated programmer to: (a) "alternative delivery media, such as MMDS or TVROs;" and (b) cable systems affiliated with the programmer. NOPR at ¶44. Neither the Commission's penetration nor volume ratio benchmark can create a presumption which substitutes for a complainant's prima facie showing of the essential elements of a statutory violation.

The statute prohibits conduct which: (1) is either "unfair" or "deceptive;" and (2) has the "purpose or effect" of preventing or significantly hindering the complainant "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Section 628(b). Thus, the issues are whether and to what extent a particular complainant's alleged lack of access to programming (or discriminatory access) significantly hindered or prevented that complainant from distributing satellite programming to consumers. The Commission cannot relieve the complainant of the obligation to prove causation by substituting a presumption based on factors which are irrelevant to that "critical threshold issue."

At the outset, there are simply "too many other factors affecting such sales volumes to permit a fair inference of discrimination" based on penetration rates or volume levels. NOPR at ¶43. For example, new services developed by vertically integrated programmers may obtain carriage on high capacity cable systems but may be unable to gain carriage on smaller capacity MMDS or SMATV systems. Yet, the programmer would be presumed to discriminate against those technologies under either a penetration or volume ratio standard.

Moreover, even if penetration or sales volume were reasonable indicia of discrimination, they are irrelevant to the question of whether such discrimination caused complain-

ant's injury. Penetration rates or sales volumes are relevant, if at all, only as an affirmative defense to allegations that the defendant has engaged in a pattern of discrimination against a particular distribution technology. Consequently, the creation of a presumption that the complainant has stated a prima facie case under Section 628, based on penetration rates or sales volumes ratios is arbitrary and unreasonable.

C. Remedial Action By The Commission Pursuant to Section 628(e) Raises Additional Constitutional Issues.

The constitutionality of the program access provisions of Section 628 already is at issue in several pending actions, and Liberty reserves its right to challenge the constitutionality of the statute and the Commission's regulations implementing it.[16] Any "remedial" action by the Commission pursuant to Section 628(e), which mandates the sale of specific programming to a specific distributor and establishes "the prices, terms and conditions" of that sale, is particularly suspect under the Constitution and is contrary to the Commission's prior recommendations to Congress.[17]

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[16] The Commission has not solicited comment on the constitutionality of the statute. Further, because the Commission has not proposed specific rules to implement Section 628, Liberty cannot assess and comment upon the constitutionality of their specific application to it.

[17] Section 628(e)(1) states that, in any adjudicatory proceeding commenced by a multichannel video programming distributor to enforce Section 628(b) or the Commission's regulations under Section 628(c), the Commission "shall have the

The Supreme Court has recognized that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). In a variety of factual contexts, the Supreme Court has applied this principle to invalidate government requirements imposed on the "distributors" of speech. See Wooley v. Maynard, 430 U.S. 705 (1977) (state requirement that residents carry an ideological message on automobile license plates); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (state statute requiring newspapers to publish the replies of political candidates whom they have criticized); Pacific Gas and Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) (state statute requiring utilities to include third-party messages in their billing envelopes).

Similar constitutional principles should invalidate government efforts to require particular speakers to publish their ideas and views through particular distributors pursuant to government mandated prices, terms and conditions. See, e.g., Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (Government restrictions on "the speech of some elements of our society in order to enhance the relative voice of others is wholly

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power...to establish prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor."

foreign to the First Amendment"). Forcing a particular programmer to sell its programming to a particular distributor pursuant to prices, terms and conditions set by the government in order to promote the economic and competitive fortunes of that distributor is equally "foreign to the First Amendment."

Aside from its constitutional implications, such government micromanagement of the programmer-distributor relationship is contrary to the Commission's own advice to Congress that any legislative action in this area must be "temporary, limited and targeted." Report to Congress, 5 FCC Rcd. at 5031-32. In making its recommendation, the Commission expressly recognized that "it is in many ways inappropriate and inadvisable for the government to intrude in programming negotiations or to substitute its judgment to resolve legitimate business concerns." Id. Thus, remedial action pursuant to Section 628(e) must be "temporary, limited and targeted" and must not substitute the Commission's judgment concerning the appropriate prices, terms and conditions of specific programming contracts.

D. The Proposed Enforcement Procedures Must Be Revised To Ensure Procedural Fairness.

Section 628(d) permits a multichannel video programming distributor allegedly aggrieved by a violation of Sections 628(b) or (c) to commence an adjudicatory proceeding at the Commission, and Section 628(f) requires the Commission

to prescribe regulations governing such proceedings. Consequently, the Commission seeks comment on various procedures by which it proposes "to expedite complaint resolution" and to "encourage substantive discussions of the issues in dispute." NOPR at ¶39. While Liberty supports the Commission's effort to formulate expedited procedures for resolving such complaints, it suggests limited revisions to the Commission's proposal in order to ensure procedural fairness.

1. Initial Pleadings Should Be Limited To Complaints And Answers Which Are Supported By Affidavits And All Relevant Documents.

The Commission's proposal to require each factual allegation in a complaint to be supported by affidavits or relevant documents attached to the pleading will quickly focus and potentially narrow the issues. NOPR at ¶40. The Commission should dismiss "that portion of the complaint" for which appropriate support is not provided, as well as any claim pleaded with insufficient specificity. Id. However, the proposed pleading standards applicable to answers should be modified.

The Commission has proposed to require an answer within twenty days after service of the complaint (NOPR at ¶40) and to defer the filing of any pre-answer motions until the time an answer is due. NOPR at ¶39. Except in the most simplistic proceedings, the twenty-day period for an answer

is inadequate for a defendant to retain counsel, examine the factual allegations and applicable precedent, and prepare a thorough answer to a formal complaint. Under federal court "notice pleading" practice, complaints often are not as detailed and complex as those likely to be filed pursuant to Section 628(b) and (c) and may not require the same time and effort to answer. Even in federal court, time periods for filing answers in complex cases are routinely extended.

The limited answer period is particularly unreasonable because of the Commission's proposal to require full "substantive support of all factual allegations or denials." NOPR at ¶40. While a complainant may take months to prepare its complaint and supporting documentation, including the affidavits of expert witnesses, the Commission's proposal would require a defendant to prepare an equally detailed response in just twenty days. If the Commission adopts such a short time period for answers, it must provide appropriate procedures for supplementing answers such that the denial of any allegation in the initial answer without sufficient supporting evidence will not be deemed an admission.

The limited time for an answer and the full documentation requirement are even more burdensome in the context of the Commission's proposal to prohibit the filing of motions to dismiss until the time an answer is due. If a complaint fails to state a claim or lacks the required specificity, or if the

Commission lacks jurisdiction over a complaint, a defendant should not be forced to file an answer, with full supporting documentation. Requiring a defendant to answer a legally insufficient complaint and to move contemporaneously to dismiss or for summary judgment[18] unnecessarily wastes a defendant's time and resources.

Liberty supports the Commission's proposal to eliminate replies to answers. NOPR at ¶39. The complaint/answer process is designed primarily to frame the issues in a proceeding and, as the Commission has noted, that process generally is complete after an answer is filed.

Finally, the Commission should permit the filing of pre-answer motions for a more definite statement. See Section 1.727(b). Although the Commission proposes to dismiss complaints, or portions thereof, which are not pleaded with sufficient specificity, the Commission may be reluctant to dismiss a claim summarily despite its vagueness. In those instances, a defendant should be permitted to seek a more definite and particularized statement of the claims against it before answering. The benefit of clearly identifying and narrowing the issues in dispute at the outset will more than

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[18] A motion for summary judgment requires a thorough briefing of one or more dispositive issues and may require expert testimony. It is not feasible to require preparation of the motion contemporaneously with an answer.

offset the delay caused by a proper motion for a more definite statement.

2. The Commission Should Permit Motions For Summary Judgment At Any Time.

Under the Commission's proposal, defendants "would not be permitted to file separate motions to dismiss or motions for summary judgment -- any such requests should be included in the answer." NOPR at ¶39. The NOPR is silent on the right to move for summary judgment after an answer is filed. Liberty strongly recommends that the Commission permit post-answer motions for summary judgment. Twenty or even thirty days is simply insufficient time to answer and move to dismiss or for summary judgment in a proceeding of even minimal complexity.

Even if not dispositive of all claims, a motion for summary judgment filed during the course of discovery may narrow the remaining issues for discovery or eliminate the need for further discovery. Thus, the Commission's proposal to require that motions for summary judgment be included in the answer will eliminate a useful tool in cases where there simply is insufficient time to obtain the necessary affidavits and expert testimony prior to filing an answer. By effectively eliminating such motions, the Commission would prevent early resolution of a proceeding to the prejudice of respondents.

3. Discovery Should Proceed Only After Initial Review By the Commission And Should Include Appropriate Confidentiality Requirements.

By deferring all discovery until after the staff determines whether the complainant has stated a prima facie claim, the Commission will have the benefit of reviewing all documentation submitted by the parties in support of their respective allegations and denials. This should enable the Commission to identify those issues which are genuinely in dispute and set "appropriate limits on discovery" necessary to resolve those issues. In suitable cases, the Commission also should bifurcate discovery to address initially any potentially dispositive threshold issues.

Initial discovery should be limited to a specified number of interrogatories (see, e.g., Section 1.729) and production of the allegedly discriminatory contracts as contemplated by Section 628(f)(2). Further discovery should be conditioned on a showing of good cause stating the additional discovery necessary and demonstrating the specific prejudice to the moving party if such discovery is not authorized.

The number and scope of discovery disputes could be substantially reduced through adoption of regulations similar to Fed. R. Civ. P. 37(a)(4). Under that Rule, the party or attorney "whose conduct necessitated" the filing of a motion to compel pays the "reasonable expenses" and "attorney fees" of the prevailing party unless the court finds that the losing

party's position "was substantially justified." Thus, in any instance in which the parties are unable to resolve a discovery dispute by agreement,[19] the losing party on a motion to compel should pay the costs and reasonable attorney fees of the prevailing party in bringing or responding to the motion. In addition to deterring overly broad discovery and unsupported objections, this proposal would encourage resolution of discovery disputes by agreement without expending Commission resources to resolve motions to compel.

Liberty also supports the Commission's proposal to include "a protective order with respect to document production" in any discovery order issued by the staff in complaint cases. NOPR at ¶47. However, in addition to limiting "dissemination of the information" contained in documents produced by the parties, the protective order also should prohibit parties which receive confidential information from using that information for any purpose other than the formal complaint proceeding. Thus, confidential information should not be used

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[19] Fed. R. Civ. P. 26(f) requires attorneys to make "reasonable effort to reach agreement" on discovery before scheduling a discovery conference with the Court. Fed. R. Civ. P. 37(g) requires attorneys to "participate in good faith in the framing of a discovery plan by agreement" and provides for payment of attorney's fees and costs where a party fails to do so. Rule 37(a) of the Superior Court of the District of Columbia goes one step further and requires the parties "to meet for a reasonable period of time" to attempt to resolve discovery disputes before bringing a motion to compel. The Commission should combine these rules to require the parties to meet to attempt to resolve discovery disputes by agreement.